No. 98- (1)

Supreme Court, U.S.
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# Supreme Court of the United States

OCTOBER TERM, 1998

CATHERINE M. FORD,

*Petitioner,*

*v.*

TOWN OF GRAFTON,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO
THE APPEALS COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS

## PETITION FOR WRIT OF CERTIORARI


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## QUESTIONS PRESENTED.

I. Whether the trial Court erred in granting defendant-appellant Town of Grafton directed verdicts as to plaintiff-appellant Catherine Ford's due process and equal protection claims where triable issues of fact were more than sufficiently established as to each claim through which included the Town of Grafton's repeated failure to enforce a domestic abuse protection order against Miss Ford's ex-husband and that where more than sufficient evidence existed to show that the Town's actions enhanced the risk of harm presented by ex-husband.

II. Whether Miss Ford was entitled to proceed with a procedural due process claim where more than sufficient evidence existed to show that she had a property interest in her protective order and its enforcement and the Town's repeated failure to enforce coupled with affirmative misrepresentations concerning her right to enforcement proximately caused her injuries.

III. Whether Miss Ford was entitled to proceed with her equal protection claim where more than sufficient evidence existed to show a pattern or practice of disparate treatment against a domestic abuse victim as well as the Town's intent to discriminate.

## LIST OF PARTIES.

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## PETITION FOR WRIT OF CERTIORARI

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## OPINIONS BELOW.

The Appeals Court for the Commonwealth of Massachusetts (Flannery, J.) wrote an opinion relevant to the issues raised in the petition and is reprinted in Petitioner's Appendix 1a-22a.

## JURISDICTION.

Judgment on the Directed Verdict was entered under Mass. R. Civ. P. 50(a), 365 Mass. 874 (1965), on November 7, 1995. The Appeals Court for the Commonwealth of Massachusetts affirmed this judgment on May 8, 1998, and the Supreme Judicial Court for the Commonwealth of Massachusetts denied further appellate review on July 2, 1998. This Court has jurisdiction to review the judgment of the Appeals Court for the Commonwealth of Massachusetts under 28 U.S.C. § 1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

**Constitution of the United States, Amendment XIV, Section 1:**

> All persons born or naturalized in the United States and Subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

**42 U.S.C. § 1983**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

MASSACHUSETTS GENERAL LAWS — CHAPTER 208

**DIVORCE**

**208:34C. Orders to vacate marital home and orders of restraint; notice to law enforcement agencies; procedures; violations.**

Section 34C. Whenever a division of the probate and family court department issues an order to vacate under the provisions of section thirty-four B, or an order prohibiting a person from imposing any restraint on the personal liberty of another person under section eighteen or under the provisions of section thirty-two of chapter two hundred and nine, the register shall transmit two certified copies of each order forthwith to the appropriate law enforcement agency which shall serve one copy of each such order upon the defendant. Unless otherwise ordered by the court, service shall be by

delivering a copy in hand to the defendant. Law enforcement agencies shall establish procedures adequate to insure that an officer at the scene of an alleged violation of such order may be informed of the existence and terms of such order.

The court shall notify the appropriate law enforcement agency in writing whenever any such order is vacated by the court and shall direct the agency to destroy all records of such vacated order and such agency shall comply with such directive.

Any violation of such order shall be punishable by a fine of not more than five thousand dollars or by imprisonment for not more than two and one-half years in the house of correction, or both such fine and imprisonment. Each such order issued shall contain the following statement: VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE.

Any such violation may be enforced in the superior or district or Boston municipal court departments. Criminal remedies provided herein are not exclusive and do not preclude any other available civil or criminal remedies. The superior, probate and family, district and Boston municipal court departments may each enforce by civil contempt procedure a violation of its own court order.

## CHAPTER 209 — **ABUSE PREVENTION**

### 209A:1. Definitions.

Section 1. The following words as used in this chapter shall have the following meanings:—

"Abuse", the occurrence of one or more of the following acts between family or household members:

(a) attempting to cause or causing physical harm;

(b) placing another in fear of imminent serious physical harm;

(c) causing another to engage involuntarily in sexual relations by force, threat of force or duress.

"Court", the superior, probate and family, district or Boston municipal court departments of the trial court.

"Family or household member", household member, former household member, a spouse, former spouse or their minor children, blood relative or person who, though unrelated by blood or marriage, is the parent of the plaintiff's minor child.

"Law officer", any officer authorized to serve criminal process.

**209A:2. Abuse prevention proceedings; venue.**

Section 2. Proceedings under this chapter shall be filed, heard and determined in the superior court department or the Boston municipal court department or respective divisions of the probate and family or district court departments having venue over the plaintiff's residence. If the plaintiff has left a residence or household to avoid abuse, such plaintiff shall have the option of commencing an action in the court having venue over such prior residence or household, or in the court having venue over the present residence or household.

**209A:3. Remedies; period of relief.**

Section 3. A person suffering from abuse from an adult or minor family or household member may file a complaint in the court requesting protection from such abuse, including, but not limited to, the following orders:—

(a) ordering the defendant to refrain from abusing the plaintiff whether the defendant is an adult or minor;

(b) ordering the defendant to vacate forthwith the household. Notwithstanding the provisions of section thirty-four B of chapter two hundred and eight, an order to vacate shall be for a fixed period of time, not to exceed one year, at the expiration of which time the court may extend any such order upon motion of the plaintiff for such additional time as it deems necessary to protect the plaintiff from abuse;

(c) awarding the plaintiff, in the case of husband and wife, temporary custody of a minor child;

(d) ordering the defendant to pay temporary support for the plaintiff or any child in the plaintiff's custody or both, when the defendant has a legal obligation to support such a person;

(e) ordering the defendant to pay to the person abused monetary compensation for losses suffered as a direct result of such abuse. Compensatory losses shall include, but not be limited to, loss of earnings or support, out-of-pocket losses for injuries sustained, medical and moving expenses and reasonable attorneys' fees;

(f) ordering the plaintiff's address to be impounded as provided in section eight.

No filing fee shall be charged for the filing of the complaint. The plaintiff shall not be charged for copies of orders entered by the court.

Any relief granted by the court shall be for a fixed period of time not to exceed one year, at the expiration of which time the court may extend any order, upon motion of the plaintiff, for such additional time as it deems necessary to protect the plaintiff from abuse. The court may modify its order at any subsequent time upon motion by either party.

No order under this chapter shall in any manner affect title to real property.

Any action commenced under the provisions of this chapter shall not preclude any other civil or criminal remedies. A party filing a complaint under this chapter shall be required to disclose any prior or pending actions for divorce under chapter two hundred and eight, separate support under two hundred and nine, or abuse prevention under this chapter.

If there is a prior or pending order from the probate and family court department of the trial court for divorce under chapter two hundred and eight, or separate support under chapter two hundred and nine, an order issued in the district court or Boston municipal court departments pursuant to this chapter shall be restricted to ordering the defendant to refrain from abusing the plaintiff whether the defendant is an adult or minor, or ordering the defendant to vacate forthwith the household.

If the parties to a proceeding under this chapter are parties in a subsequent proceeding for divorce under chapter two hundred and eight or for separate support under chapter two hundred and nine, any custody or support order or judgment issued in the divorce or separate support proceeding shall supersede any prior custody or support order under this chapter.

**209A:4. Temporary orders; notice; hearing.**

Section 4. Upon the filing of a complaint under this chapter, the court may enter such temporary orders as it deems necessary to protect a plaintiff from abuse, including relief as provided in section three. Such relief shall not be

contingent upon the filing of a complaint for divorce or separate support.

If the plaintiff demonstrates a substantial likelihood of immediate danger of abuse, the court may enter such temporary orders without notice as it deems necessary to protect the plaintiff from abuse and shall immediately thereafter notify the defendant that the temporary orders have issued. Notice shall be made by the appropriate law enforcement agency as provided in section seven. The court shall give the defendant an opportunity to be heard on the question of continuing the temporary order no later than five days after such orders are entered. If the defendant does not appear at such subsequent hearing the temporary orders shall continue in effect without further order of the court.

**209A:5. Granting of relief when court closed; relief granted by telephone; certification.**

Section 5. When the court is closed for business, any justice of the superior, probate and family, district or Boston municipal court departments may grant relief to the plaintiff as provided under section four if the plaintiff demonstrates a substantial likelihood of immediate danger of abuse. If relief has been granted without the filing of a complaint pursuant to this section of this chapter, then the plaintiff shall appear in court on the next available business day to file said complaint. Notice to the plaintiff and defendant and an opportunity for defendant to be heard shall be given as provided in said section four.

Any order issued under this section and any documentation in support thereof shall be certified on the next court day by the clerk-magistrate of the court issuing such order to the court having venue and jurisdiction over the matter. Such

certification to the court shall have the effect of commencing proceedings under this chapter and invoking the other provisions of this chapter but shall not be deemed necessary for an emergency order issued under this section to take effect.

**209A:6. Powers of police; civil liability; victim's right to copy of incident report; notice of release of arrested persons; no-contact orders.**

Whenever any law officer has reason to believe that a family or household member has been abused or is in danger of being abused, such officer shall use all reasonable means to prevent further abuse, including: (1) remaining on the scene as long as there is immediate danger to the physical safety of such person without the presence of a law officer, including but not limited to staying in the dwelling unit for a reasonable period of time; (2) assisting such person in obtaining medical treatment necessitated by an assault, which may include driving the victim to the emergency room of the nearest hospital, or arranging for appropriate transportation to a health care facility, any law to the contrary notwithstanding; (3) giving such person immediate and adequate notice of his or her rights; (4) arresting any person whom the officer has probable cause to believe has committed a felony; (5) arresting any person who has committed, in the officer's presence, a misdemeanor which involves abuse; (6) arresting any person whom the officer has probable cause to believe has committed a misdemeanor pursuant to section thirty-four C of chapter two hundred and eight or section seven of chapter two hundred and nine A.

The notice as required in clause (3) of section six shall consist of handing such person a copy of the following

statement written in English and Spanish and reading the same to such person in English.

"You have the right to go to the superior, probate, and family, district or Boston municipal court if you reside within the appropriate jurisdiction, and file a complaint requesting any of the following applicable orders; (a) an order restraining your attackers from abusing you; (b) an order directing your attacker to leave your household; (c) an order awarding you custody of a minor child; (d) an order directing your attacker to pay support for you or any minor child in your custody if the attacker has a legal obligation to support them; and (e) an order directing your attacker to pay you for losses suffered as a result of the abuse, including medical and moving expenses, loss of earnings or support, attorneys fees and other out-of-pocket losses for injuries sustained."

"For an emergency on weekends, holidays or weeknights, you should contact the police, who will refer you to a justice of the superior, probate and family, district or Boston municipal court departments".

"You have the right to go to the appropriate district court or the Boston municipal court and seek a criminal complaint for threats, assault and battery, assault with a deadly weapon, assault with intent to kill or other related offenses".

"If you are in need of medical treatment, you have the right to request that the officer present drive you to the nearest hospital or otherwise assist you in obtaining medical treatment".

"If you believe that police protection is needed for your physical safety, you have the right to request that the officer present remain at the scene until you and your children can leave or until your safety is otherwise insured".

**209A:7. Abuse prevention orders; domestic violence record search; service of order; enforcement; violations.**

Section 7. Whenever the court orders the defendant to refrain from abusing the plaintiff or orders the defendant to vacate the household under section three or four, the register or clerk-magistrate shall transmit two certified copies of each such order and one copy of the complaint and summons forthwith to the appropriate law enforcement agency which shall serve one copy of each order upon the defendant, together with a copy of the complaint and summons. Unless otherwise ordered by the court, service shall be by delivering a copy in hand to the defendant. Law enforcement officers shall use every reasonable means to enforce such orders. Law enforcement agencies shall establish procedures adequate to insure that an officer on the scene of an alleged violation of such order may be informed of the existence and terms of such order. The court shall notify the appropriate law enforcement agency in writing whenever any such order is vacated and shall direct the agency to destroy all record of such vacated order and such agency shall comply with such directive.

Any violation of such order shall be punishable by a fine of not more than five thousand dollars or by imprisonment for not more than two and one-half years in a house of correction or both such fine and imprisonment. Each such order issued shall contain the following statement: VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE.

Any such violation may be enforced in the superior, the district of Boston municipal court departments. Criminal remedies provided herein are not exclusive and do not preclude any other available civil or criminal remedies. The superior, probate and family, district and Boston municipal de-

partments may each enforce by civil contempt procedure a violation of its own court order.

**209A:8. Address of plaintiff; exclusion from court documents; confidentiality of records.**

Section 8. Upon the request of the plaintiff, the court shall impound the plaintiff's address by excluding same from the complaint and from all other court documents which are available for public inspection, and shall ensure that the address is kept confidential from the defendant and defendant's attorney.

The records of cases arising out of an action brought under the provisions of this chapter where the plaintiff or defendant is a minor shall be withheld from public inspection except by order of the court; provided, that such records shall be open, at all reasonable times, to the inspection of the minor, said minor's parent, guardian, attorney, and to the plaintiff and plaintiff's attorney, or any of them.

**209A:9. Form of complaint; promulgation.**

The administrative justices of the superior court, probate and family court, district court, and the Boston municipal court departments shall jointly promulgate a form of complaint for use under this chapter which shall be in such form and language to permit a plaintiff to prepare and file such complaint *pro se*.

CHAPTER 276 — **SEARCH WARRANTS, ETC.**

**276:28. Arrest without warrant.**

Section 28. "Any officer authorized to serve criminal process may arrest, without a warrant, and detain a person found in the act of stealing property in the presence of the officer regardless of the value of the property stolen and may arrest, without a warrant, and detain a person whom the officer has probable cause to believe has committed a misdemeanor by violating an order to vacate under section thirty-four B of chapter two hundred and eight or section three or four of chapter two hundred and nine A: or a temporary restraining order under section eight or section thirty-two of chapter two hundred and nine or section three or four of chapter two hundred and nine A."

Said officer may arrest and detain a person charged with a misdemeanor, without having a warrant for such arrest in his possession. If the officer making such arrest and detention shall have actual knowledge that a warrant then in full force and effect for the arrest of such person has in fact issued.

## STATEMENT OF THE CASE.

The horrific events of January 17, 1986, when twenty-six year old Catherine Ford was shot three times at point blank range in the mouth by her ex-husband and left permanently paralyzed more probably than not could have been averted but for the Town of Grafton's repeated failures to enforce Miss Ford's domestic abuse protective order and overt misrepresentations concerning her right to enforcement. For this reason, on July 2, 1987, she filed a complaint, in Worcester

Superior Court against the Town of Grafton (hereinafter "Grafton") alleging negligence under Massachusetts General Laws Chapter 258, violations of civil rights to due process and equal protection under federal law, 42 U.S.C. § 1983, and violations of civil rights under state law.

During the ensuing eight years, two defense motions for summary judgment were denied by two different superior court justices, and trial was finally set for October 30, 1995, before a third judge, Kottmeyer, J. Just prior to trial, Grafton filed a Motion in Limine to preclude Ford's counsel from mentioning in her opening and from introducing any evidence pertaining to (i) her claim under Chapter 258, and (ii) a November 1984 incident involving a Julie McDermyd [*sic*] with the Town's police. During the course of the argument on this motion, before hearing any evidence or reviewing the pertinent law, the trial judge made it clear that she believed the case could be decided on a motion for summary judgment. She then ordered that Ford proceed with that portion of the case regarding liability with the understanding that she might later recall witnesses concerning damages. Ford objected to this bifurcation, but trial proceeded in this manner before a jury on October 31, November 1 and November 2, 1995.

At the close of Ford's case as to liability, the judge allowed defense motions for a directed verdict without an explanatory memorandum. Judgment on the Directed Verdict was entered under Mass. R. Civ. P. 50(a), 365 Mass. 874 (1965), on November 7, 1995, and plaintiff appealed to the Appeals Court on November 8, 1995.

On October 18, 1984, Miss Ford, who was then twenty-four, obtained a c. 209A order from the Worcester Probate and Family Court against her then husband, James Davidson ("Davidson"), which (1) prevented him from imposing any

restraint on her personal liberty and from ABUSING HER (2) ordered he stay away from her residence and (3) ordered he refrain from harassing her at her place of employment. On October 25, 1984, those identical terms were incorporated into a twelve month order of protection. Miss Ford divorced Davidson on March 5, 1985.[1] After getting this temporary order, Miss Ford brought it to the Grafton Police station where it was logged and posted.[2]

On her way to the station, she stopped to speak with a Grafton Police Office David Glispin at his home, because she knew him, and wanted direction from him as to what to do as he was a police officer in town. There was testimony that his immediate retort to plaintiff was to question what she expected of the police since "[she was] the one that married

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[1] Miss Ford had grown up in the Town of Grafton as the youngest child in a family with her parents, four sisters and one brother and had lived in the Town virtually her entire life. Immediately upon graduating from high school in 1978, she began working for Honeywell and then Raytheon Companies. She started dating Davidson in late 1978 and eventually married him, but the marriage ended when he developed a violate temper while drinking. After separating, Davidson continued to threaten to kill plaintiff, so she sought protection through the courts, and due to the substantial likelihood of immediate danger Davidson presented, an order was entered without notice, and a hearing was set for October 25, 1984.

[2] Most of the evidence referred to herein is taken directly from, or corroborated by, the defendant Town of Grafton's own police log and is, therefore, uncontroverted. All calls that came into the Police station were to be recorded in the log, but the dispatcher would decide which were important enough to do so. Any action of any kind taken by Grafton, including whether Officers were sent out or an arrest was made, would be contained within the log. Shift supervisors were required to sign the log at the end of each shift, and Officers who had been off duty were responsible for reading the log pertaining to their days off.

him [Davidson]". There was further testimony that he also stated that Davidson was Miss Ford's problem, that the police could not babysit her twenty-four hours a day, and that she should buy a gun and shoot him. As a result of this conversation, plaintiff and one of her sisters attended classes to get a firearms permit, although Miss Ford never did get the permit.

Within four days of issuance of the original protective order, on October 22, 1984, at about 3:30 P.M., when Miss Ford got out of work at Raytheon, Davidson attacked her at her car by dragging her out of the vehicle and smashing her head against its window. Northboro police arrived at this scene, but advised that Davidson could not be arrested for violating the restraining order, ostensibly because he had not as yet been served with it, whereupon he was served by Northboro officers. Plaintiff had suffered a concussion as a result of the assault and battery.

She went to the Grafton police station right after this attack and reported it, but was informed that nothing could be done since the incident had occurred in another locale. Within forty-five minutes of this report, Grafton Police were summoned to Miss Ford's parents' home at 8 Shrewsbury Street upon the complaint that Davidson was disturbing the entire Ford family there and was threatening to kill Plaintiff. No Officer spoke with anyone in the residence about these events, and Davidson was merely placed in protective custody by Officer Glispin as an incapacitated person and released at 2:20 A.M. the following morning.

On October 25, 1984, the Probate Court extended the temporary order for a year, incorporating the original identical terms through to October 25, 1985. Grafton had received the court's order and was fully aware of its provisions, even though it does not appear in its logs.

Davidson called Miss Ford and her family members throughout the entire year covered by the protective order (and thereafter) threatening to kill her and various family unless she returned to him, which threats she took seriously. She continually reported these death threats to the Grafton Police, who in turn repeatedly told her that there was nothing the police could do until he hurt her, this was her problem, they were not her babysitting service, that she should get a gun, or that she should call the phone company. During this time period, Mrs. Bowman (Miss Ford's sister) also called Grafton about such threats dozens of times, and was likewise told that there was nothing the Police could do unless Davidson hurt Miss Ford. Another of plaintiff's sisters, Joan Gervais, called Police at least six to eight times about the threats to kill.

Throughout this year, Grafton never once arrested Davidson for violating the protective order, despite plaintiff's repeated requests for help. For example, on November 20, 1984, at about 11 P.M. Mrs. Bowman called Police to say that she was concerned that Davidson might try to bother her sister, since Mrs. Bowman's husband was out of town and Davidson had already called the house. Police did check the area shortly after the call.

Within two hours, though, Miss Ford called Grafton at 1:09 A.M. (on November 21) reporting that Davidson had been drinking and was in an around the property at 1 Birch Street driving an eighteen wheel car carrier. Mrs. Bowman had also seen Davidson peering in the windows of the house at one point.

Office Wayne Tripp responded to the call, but told plaintiff that no action could be taken against Davidson unless police actually observed him at 1 Birch Street which they did

not.[3] Grafton Police did, however, contact neighboring authorities in Millbury and Shrewsbury, requesting that they check on Davidson's ability to drive since Miss Ford reported that he had been drinking though no request was made to detain him for any violation of the protective order. Millbury Police later stopped Davidson, determined that he could drive, let him go, and informed Grafton of their actions.

Three days later, on November 24, 1984, Mrs. Bowman reported to Grafton at 6:30 P.M., through Officer Catherine Fenton, that Davidson was calling her house from a bar in Worcester threatening to kidnap her infant children unless he was allowed to speak with plaintiff. These threats had frightened Miss Ford who was aware of the call. Officer Glispin patrolled the specific area at just about 6:30 P.M.

The next day, on November 25, 1984, plaintiff received a call from a Dr. Greer, a psychiatrist at the University of Massachusetts Medical School who has been treating Davidson. The doctor warned Miss Ford that he had a legal obligation to tell her that Davidson was threatening to kill her. She immediately contacted the Grafton Police and relayed the doctor's alarm, but was told that nothing could be done. Nothing beyond a single notation in the police log by Officer Fenton was ever done about it.

Mrs. Bowman also received a call from Officer Fenton who was looking for Miss Ford after receiving the same forewarning from the doctor at U. Mass. Officer Fenton stated that she legally had to tell Miss Ford of the threat and asked that the information be related to her by her sister.

Had Grafton Police done any follow-up regarding the psychiatrist's warning, they would have learned that David-

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[3] Officer Tripp testified at trial that he understood that he had to be present when violation of a protective order under Chapter 209A occurred in order to invoke his power to arrest.

son had been at the hospital and was considered homicidal and suicidal. He was there claiming that he felt strongly that he wanted to kill plaintiff, he had purchased a high powered rifle, and had Miss Ford in the cross hairs of this rifle on three prior occasions but had no ammunition at those times.

On January 10, 1995, Miss Ford and Miss Gervais attended a clerk's hearing in Westboro District Court where Davidson was present pertaining to the harassing phone calls he had been making. The plaintiff had previously filed her own application for criminal complaint relative to these calls without any assistance from Grafton.

Upon leaving the courthouse, Davidson began threatening to kill Miss Ford, so she sought refuge at her parents' 8 Shrewsbury Street home. Davidson then called there threatening to come over, causing Miss Ford to hide in an upstairs closet.

Miss Gervais called Grafton telling Officer Fenton that Davidson was then at the house bothering her sister. Two Officers arrived at the scene, but never spoke to anyone inside; they spoke only to Davidson, actually gave him advice as to how he could retrieve belongings he claimed were inside 8 Shrewsbury Street, walked with him off the property, and allowed him to drive off on his own.

On February 6, 1985, Miss Ford contacted Grafton to advise that she had information that Davidson was trying to purchase a gun, and that she was especially fearful since she was supposed to go to court the following week where she expected to see him. There was testimony that the Officer to whom she spoke, Fenton, related that there was nothing the police could do beyond noting the call, even though the Police were aware of existing procedures for tracking down firearms permits. Davidson, in fact, held a license to carry

firearms that had been reissued to him by the Town of Clinton in 1982.

On February 7, 1985, Grafton received a call from Mrs. Bowman, complaining that Davidson had been at the 1 Birch Street property earlier going through their mailbox. This call was also noted in the police log by Officer Fenton who had told Mrs. Bowman to call the Post Office.

From the inception of the protective order, Miss Ford undertook several other steps to try to protect herself from Davidson. These included changing departments at work and requesting that her employer tell Davidson that she no longer worked at Raytheon. She stopped driving and only went directly from home to work and back, being driven by a family member.

The Plaintiff also took out a private complaint for assault and battery against Davidson arising out of his October 22, 1984, attack on her in the parking lot at Raytheon without any Police assistance. On March 5, 1985, the date of her divorce, the criminal complaint was still pending, although Miss Ford agreed not to pursue it on that date out of fear and due to Davidson's assurances that he would move out of the area if she would voluntarily drop the criminal matter. He even provided her with a letter from his employer verifying that he had another job out-of-state.

Unfortunately, Davidson did not relocate but persisted with his death threat campaign. On April 25, 1985, while Miss Ford was at 1 Birch Street, Davidson came through neighboring property and into her backyard. Grafton was called at 7:59 P.M. and Officer Glispin responded but Davidson had already left the area. The Officer later requested through the Millbury Police, where Davidson lived, that Davidson be contacted to come to the Grafton Police Station. He arrived at 8:55 P.M. and, upon questioning, Davidson ad-

mitted violating the protective order by being present at 1 Birch Street.

Instead of arresting him, Officer Glispin told Davidson that he would be summonsed into court for the violation.[4] He was not, however, summonsed until some five months later, on September 19, 1985. It was the duty of the Police Officer investigating a case to provide the prosecuting attorney with all relevant information pertaining to a defendant and the crime. Nevertheless, Officer Glispin failed to provide prosecutors with any information about Davidson and Miss Ford beyond the meager information set forth in his report. Davidson pled guilty to the single offense of trespass in violation of the protective order on September 19. So, despite his year long reign of terror that was never brought to the prosecutor's or court's attention, he was simply fined $250.00 and assessed a $15.00 victim witness fee.

Plaintiff was never notified of any contemplated prosecution of Davidson, was never made aware of any court dates, and was never summonsed as a witness concerning them. She learned later that he had been fined for his April 25 offense when she read about the court proceedings in the newspaper.

By October 1985, Miss Ford had started driving again and decided to go to a birthday party for a friend after work on the twenty-fifth. She recalled this specific date because she had just resumed driving after not having done so for about a year. After leaving the party, she was stopped at a traffic light when Davidson suddenly appeared and began pounding on her car. When plaintiff got home, she called the Grafton

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[4] Officer Glispin testified that he understood at the time that he had the power to arrest if he had probable cause to believe that there had been a violation of a 209A order.

Police to report the incident and there was testimony that she was again told that there was nothing the police could do.

On October 25, 1985, the protective order expired. In November 1985, plaintiff moved into her own apartment at 60 Waterville Street, Grafton, which was just up the street from 1 Birch Street. She had decided by this point to move since she had believed that she had disrupted her sister's family for more than a year, and feared that she was endangering their lives as well. She had also determined that her only recourse was to move out-of-state, and she began making plans to do this.

Just prior to mid-January 1986, plaintiff received a death threat from Davidson and believes she reported it to Grafton. On January 16, Davidson paid the fines related to his April 25, 1985, offense and the next day proved to be the most terrifying in Miss Ford's life. On the seventeenth, she returned home from work and was making supper at about 6:00 P.M., when she heard her kitchen door breaking. Realizing that it was Davidson, she ran from her house and tried to seek shelter at a neighbor's but could not get in anywhere. As a result, Davidson caught up with plaintiff, pointed a gun in her mouth and proceeded to shoot, permanently paralyzing her, and then killed himself.[5]

On this same evening, Cindy McDermyd, a Grafton resident, was listening to the police scanner in Grafton. She heard the dispatcher tell a police cruiser that there was a disturbance involving Miss Ford. Miss McDermyd recognized the voice of the officer in the cruiser, since he had been her neighbor for many years. He responded that, "There's always trouble going on down there. They're always fighting."

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[5] Plaintiff is paralyzed from the waist down and has only partial use of her hands and is a quadriplegic.

During the time covering plaintiff's claims, October 1984 through January 1986, Grafton's Police force consisted of Chief Kearnan, three (3) Sergeants, and twelve (12) Patrol Officers. The Town's police log reveals that the Chief, all three Sergeats (Malboeuf, Snow and Messier) and nine (9) of the twelve Patrol Officers, including Officers Lewis, Usher, Perron, Cosgro, Turpin, Collette, Fenton, Glispin, and Tripp, were involved at various times in Miss Ford's requests for assistance in dealing with Davidson.[6] The majority of calls that Grafton received regarding domestic abuse cases at this time were from women.

*Grafton's Handling of Non-Domestic Incident During Identical Time Period.*

In November 1984 Julie (McDermyd) Mongeon was nineteen and living at home with her mother (Cindy McDermyd) and sister at 28 Cross Street in Grafton. Miss McDermyd had called the Grafton police on the evening of November 24, 1984, at 10:25 P.M. because Miss Mongeon's former boyfriend, a Joseph Gasco, has taken a gun from his father's house in Sutton and was threatening to kill himself and Miss Mongeon, who was at Gasco's Grafton residence. Miss Mongeon and Gasco had never lived together, he had never threatened her before, he was not a member of her

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[6] Police Chief at the time of trial, Russell Messier, and Officers Fenton, Glispin, and Tripp, all testified that they worked for Grafton during the time covering plaintiff's claims. None could recall having received any training in handling domestic abuse cases, and they had conflicting understandings as to their powers to arrest for violations of restraining orders.

household, she never had reason to fear him previously, and she had never contacted the police about him prior to the twenty-fourth. Miss Mongeon had not even dated Gasco for the approximate three to six month period prior to this incident.

In response to the mother's call, Grafton's Officer Glispin picked Miss Mongeon up at Gasco's home, drove her and her mother home, and remained in the young woman's driveway for about an additional hour or so thereafter. He also advised Sutton authorities that Gasco had allegedly stolen a gun and was trying to kill Miss Mongeon, and obtained a criminal complaint against Gasco arising out of this incident.

## REASONS FOR GRANTING THE WRIT.

### I. MISS FORD HAS A VIABLE SUBSTANTIVE DUE PROCESS CLAIM.

*DeShaney* v. *Winnebago County*, 489 U.S. 189 (1989), "established that [while] the state does not have to protect its citizens from private violence", the state is liable where, through affirmative acts, it created or enhances the dangers to which a victim is subjected. *Soto* v. *Flores*, 103 F.3d 1056 (1st Cir. 1997).

> [While] there is no constitutional right to be protected by the state against being murdered by criminals or madmen, [i]f the state puts a man in a position of danger from private persons and then fails to protect him, . . . it is as much an active tortfeasor as if it had thrown him into a snake pit.

*Soto* v. *Flores, supra* quoting *Bowers* v. *DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). The very nature of plaintiff's substantive due process claim is that Grafton's affirmative acts, in derogation of mandatory duties under Chapter 209A, caused her protective order to lapse, stripping her of its protections and placing her in harms way.

In the context of domestic abuse, it has long been understood that an arrest communicates to an abuser that abuse will not be tolerated, "that the abuser has committed a crime, that the victim has a right not to be [abused], and that the criminal justice system will act to stop [it]". Lerman, EXPANSION OF ARREST POWER: A KEY TO EFFECTIVE INTERVENTION, 7 Vermont L.Rev. 59, 60 (1982). One of the hallmark features of Chapter 209A, this Commonwealth's Abuse Prevention legislation, is that since 1983, it has called for the mandatory arrest of any person whom the police had probable cause to believe violated orders to refrain from abuse or remain away. *Commonwealth* v. *Gordon*, 407 Mass. 345, 347 (1990). Chapter 209A, §§ 6, 7, as amended by St. 1983, c. 678, §§ 4, 5.1 this Court has hailed this criminal remedy as the single most critical component for purposes of accomplishing the Legislature's objective of abuse prevention. *Commonwealth* v. *Gordon*, 407 Mass. at 346-47.

Once Miss Ford's protective order issued thereafter, it constituted a promise by Grafton that whenever its police had reason to believe that Davidson had violated his order to remain away from 1 Birch Street or refrain from abusing her, the Town would arrest Davidson. As an adjunct to this, Grafton was also required to provide her with an explanation of her rights under the law. G.L. c. 209A, § 6, ¶ 1, subsection (3), as amended by St. 1983, c. 678, § 4.

The Appeals Court agrees that the Town failed repeatedly to arrest Davidson despite its obligation to do so under

Chapter 209A, but ruled that the Town was immune from liability.

As powerful as the *Soto's* facts are, plaintiff's are even more striking for she is not relying upon a single incident and affirmative violation of law to make out her claim. To the contrary, Miss Ford repeatedly sought the mandatory protections she was entitled to receive, but Grafton's continual affirmative acts rendered her powerless to deal with Davidson's abuse. *Smith* v. *City of Elyria*, 857 F. Supp. 1203 (N.D. Ohio 1994) (one incident sufficient to raise enhancement of harm claim where police gave abusive spouse advice as to his rights).[7]

It makes no sense at all to find that a court issued protective order, specifically directed towards Miss Ford's safety, of which the Grafton police where fully aware and mandated to enforce, does not constitute a direct assurance of safety. It makes even less sense to find that a Town can render a protective order a nullity as done here simply by misstating its responsibilities concerning enforcement.

For these reasons, the Appeals Court incorrectly concluded that the Town's actions were not such as to give rise to a constitutional duty to protect, even if they may have rendered her "more vulnerable to danger . . ." This simplistic view of the evidence overlooks the fact that the Town's actions effectively stripped Miss Ford of the single most significant protective device which the Massachusetts Legislature had determined would have prevented her from suffering any further abuse at the hands of her ex-husband.

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[7] The *Soto* Court declined to decide the matter because the case was decided on the basis of qualified immunity a principle not applicable here because individual officials have not been served. *Pasqualone* v. *Gately*, 422 Mass. 398, 402 (1996).

## II. Miss Ford has a Viable Procedural Due Process Claim.

In *Soto* v. *Flores*, 103 F.3d 1056 (1st Cir. 1997), the Court of Appeals cited *Coffman* v. *Wilson Police Department*, 739 F. Supp. 257, 263-66 (E.D. Pa. 1990), as providing for a potential procedural due process claim under 42 U.S.C. § 1983, upon a showing that state law made certain protections mandatory, thereby creating an enforceable property interest. *Soto* v. *Flores, supra.*[8] The Appeals Court is wrong, therefore, to deny Miss Ford the opportunity to proceed with this claim in light of unambiguously mandatory language in Chapter 209A, the facts adduced, and this precedent.

This aspect of Miss Ford's claim, however, is not limited to the right to police response on January 17, 1986, but is premised upon her right to have had Davidson mandatorily arrested for his dozens of violations of her protective order and corollary right to have Grafton advise her as to the contours of her entitlement to police protection. The Appeals Court decision relies on the fact that the order was not in place on January 17, 1996, which itself overlooks the Town's responsibility for non-renewal. In fact, the massive dereliction of its mandatory duty to arrest Davidson each time he

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[8] While the *Soto* Court never reached the question whether Puerto Rico law created such an enforceable interest because the plaintiff did not raise the issue, the *Coffman* Court had held that properly served protective orders issued pursuant to the Pennsylvania Protection From Abuse Act which provided that appropriate police departments "shall" enforce those orders, created a constitutionally protected property interest, even though the Abuse Act itself provided that arrests for violations of order "may be made without a warrant." *Coffman* v. *Wilson*, 739 F. Supp. at 264-67. Here, Chapter 209A mandated that arrests "shall" be made for violations under its Section 7.

was present at 1 Birch Street or placed Miss Ford in reasonable fear that he might imminently harm her more than sufficiently drew the requisite causal link between plaintiff's injuries and Grafton's acts or omissions to justify submission to the jury, *Williams* v. *Fontes*, 383 Mass. 95, 97-98 (1981) (whether violation of statute had causal connection with plaintiff's harm is question of fact).[9] Here harm by Davidson was the precise consequence of Grafton's failure to enforce plaintiff's protective order, which the Legislature had foreseen when it issued Miss Ford the restraining order, which Grafton knew was specifically contemplated under that order, and which the mandatory arrest provisions were designed to prevent.

## III. Miss Ford Has a Viable Equal Protection Claim.

With regard to her equal protection claim, Miss Ford introduced sufficient evidence to show that Grafton had a pol-

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[9] In this regard, the Legislature's determination of the actions Grafton's officers were required to undertake was the equivalent of expert testimony. *Polonsky* v. *Union Hospital*, 11 Mass. App. Ct. 622, 625 (1981) ("hospital regulation is, in a sense, an expert opinion" concerning standard of care); *Nearing* v. *Weaver*, 295 Or. 702, 707, 670 P.2d 137, 141 (1983); Nolan & Sartorio, 37 M.P.S. § 208 at 348 (the Legislature may establish a standard of conduct). Further, the evidence here highlighted that plaintiff consistently sought the protections of Chapter 209A, but was repeatedly denied them by Grafton. The issue not only should have gone to the jury, but the jury should have been instructed that if it found Chapter 209A's protections were not provided, it could infer that those measures "could well have provided the extra margin of safety necessary" to prevent plaintiff's harm. *Williams* v. *Fontes*, 383 Mass. at 98.

icy or practice that provided less protection to victims of domestic violence than to victims of other crimes, that class and/or gender discrimination was a motivating factor behind the policy, and she was injured by the practice. *Soto* v. *Flores*, 96-1024, slip op. at 25, citing *Watson* v. *City of Kansas*, 857 F.2d 690 (10th Cir. 1988). The municipal policy or custom is established here through plaintiff's own experience with Grafton since it included a series of contacts over a year that ended in a "single brutal incident" sufficient to show that a violation took place. *Thurman* v. *City of Torrington*, 595 F. Supp. 1521, 1530 (D. Conn. 1984). It is also shown through the failure to train Officers in domestic abuse. *Manarite* v. *Springfield*, 957 F.2d 953, 958 (1st Cir. 1992). This evidence, together with Chapter 209A's mandate to protect domestic abuse victims that was repeatedly flaunted by Grafton personnel, the preferential treatment given the non-domestic abuse victim Julie Mongeon at the same time, and Grafton's consistently demeaning statements to and regarding plaintiff concerning her marital status and requests for help, required that the claim be submitted to the jury. *Soto* v. *Flores, supra. Balistreri* v. *Pacifica Police Department*, 901 F.2d 696, 701 (9th Cir. 1990).

## CONCLUSION.

This case directly affects the viability of every single domestic abuse protective order issued in this Commonwealth. It goes to the heart of a municipality's police responsibility to its citizens and the right to mandatory enforcement of such orders.

Because Grafton was mandated to protect Miss Ford and promised to do so, and all the while affirmatively misrepresented her rights causing her to refrain from renewing her

protective order thereby rendering here more vulnerable to Davidson's ultimate attack, the Appeals Court was wrong in concluding that no causes of action exist at law. Even further, not a single other case exists in this country involving (i) a mandatory duty under state law to protect a specific plaintiff from the potential harm posed by a specific third person; (ii) a mandatory duty to advise a plaintiff of rights under such law; (iii) repeated failures to protect in compliance with mandates of law; and (iv) repeated affirmative acts involving misrepresentations of rights under the law which caused a plaintiff to refrain from seeking protection thereunder.

For these reasons, Miss Ford requests that certiorari be granted.

Respectfully submitted,

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**APPENDIX A**

96-P-1941 Appeals Court

CATHERINE M. FORD vs. TOWN OF GRAFTON.

No. 96-P-1941.

Worcester. February 4, 1998. - May 8, 1998.

Present: Kass, Smith, & Flannery, JJ.

Massachusetts Tort Claims Act. Negligence, Police, Municipality. Governmental Immunity. Municipal Corporations, Liability for tort. Police. Police, Negligence. Civil Rights, Immunity of public official. Protective Order.

Civil action commenced in the Superior Court Department on July 2, 1987.

The case was heard by Diane M. Kottmyer, J.

Patrice C. Whalen (Elizabeth A. Fisher with her) for the plaintiff.

Leonard H. Kesten for the defendant.

FLANNERY, J. A directed verdict was entered against the plaintiff at the close of her case-in-chief, and she appeals. We summarize the evidence from her perspective. See Boyle v. Wenk, 378 Mass. 592, 593 (1979); Dobos v. Driscoll, 404 Mass. 634, 656, cert. denied, 493 U.S. 850 (1989).

On October 18, 1984, Catherine M. Ford obtained a temporary protective order from the Worcester Probate and

Family Court, pursuant to G. L. c. 209A. The order required that James Davidson, Ford's husband from whom she was separated,[1] (1) be prevented from imposing any restraint on her personal liberty and from abusing her; (2) stay away from 1 Birch Street, North Grafton, where Ford resided with her sister, Theresa Bowman, and her sister's husband; and (3) refrain from harassing Ford at her place of employment at Raytheon Company in Northborough.

On her way to the Grafton police station to get the protective order logged and posted, Ford stopped to speak with Officer David Glispin of the Grafton police at his home. She sought advice from Glispin on her situation, as he was a person she knew and an officer in town. Glispin told her that the situation with her husband was her problem. He stated that the police could not babysit her twenty-four hours a day. Rather, he advised her to buy a gun because the only way to deal with violence was violence.

On October 22, 1984, four days after the issuance of the protective order, Davidson attacked Ford when she left work. He dragged her from her vehicle and smashed her head against the car window, causing a concussion. The Northborough police arrived at the scene but advised Ford that Davidson could not be arrested for violating the protective order because he had not been served with the order. The police then served Davidson with the order and let him leave.

Ford was driven home from the scene by her sister and her sister's husband. She testified that her car was towed because Davidson had tampered with the vehicle so it would not start. She went from her home to the Grafton police department to report the attack. She was informed nothing

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[1] The divorce of Ford from Davidson became final on March 6, 1985.

could be done because the incident has occurred in Northborough. Forty-five minutes later, Joanie Gervais, Ford's sister, called the Grafton police department and reported that Davidson was at her parents' house threatening to kill Ford if the family did not let him see or speak to her. One Grafton police officer responded to the phone call and took the intoxicated Davidson into protective custody, as an incapacitated person, without speaking to any family member. Davidson was released the following morning.

On October 25, 1984, Ford's temporary protective order was extended to October 25, 1985. The Grafton police department received the court order and was aware of its provisions, despite its unexplained absence from the department's logs.

During the year the protective order was in force, Ford and her family received numerous death threats from Davidson. She continually reported these threats to the Grafton police but was repeatedly told that there was nothing the police could do until Davidson caused her physical harm. The police also told her that they were not a babysitting service and that the situation was her problem. They suggested that she get a gun or call the telephone company.

Ford attempted to protect herself from Davidson by changing departments at work and requesting that her employer tell Davidson she no longer worked there. She also stopped driving and traveled only from home to work and back, being driven by others. During this period, Ford's sisters also called the Grafton police dozens of times about the death threats. They too were told that the police would do nothing until Davidson actually hurt Ford.

The Grafton police department never arrested Davidson for violating the protective order, despite the reported complaints made by Ford and her family against Davidson. Spe-

cifically, on November, 20, 1984, at approximately 11 P.M., one of Ford's sisters called the police and stated that she was concerned for Ford's safety because Davidson had called the house and the sister's husband was out of town. The police checked the area after receiving the telephone call. Two hours later, Ford called the police, reported that she had a restraining order against Davidson, and stated that he was driving an eighteen-wheel car carrier around the property at 1 Birch Street, had been peering in the windows of the house, and appeared to be drunk.

Officer Wayne Tripp responded to the call and told Ford that no action could be taken against Davidson unless the police actually observed him at 1 Birch Street. The Grafton police contacted authorities in Millbury and Shrewsbury, requesting that they check on Davidson's ability to drive, but they made no request that he be detained for violating the protective order. The Millbury police stopped Davidson, determined that he was not driving under the influence, let him go, and informed Grafton of their actions.

On November 24, 1984, Ford's sister called the Grafton police and reported that Davidson repeatedly called her house from a bar in Worcester threatening to kidnap her infant children unless he was allowed to speak with Ford. Officer Glispin testified that he patrolled the immediate area of 1 Birch Street. However, neither Glispin nor any other member of the Grafton police department made any effort to locate Davidson. The police did not take out a complaint, seek an arrest warrant, or, arrest Davidson for this incident.

On November 25, 1984, Ford received a telephone call from a psychiatrist at the University of Massachusetts Medical School who was treating Davidson. The psychiatrist warned Ford that he had a legal obligation to tell her that Davidson was threatening to kill her. She immediately con-

tacted the Grafton police and relayed the doctor's concern. She was told that nothing could be done about the situation, although officer Fenton made a notation in the police log. The Grafton police also received a forewarning call from the psychiatrist. Officer Fenton called Ford's sister, stated that she (the officer) was legally obligated to tell Ford of the threat, and asked that the information be relayed to her.

On January 10, 1985, Ford and a sister attended a clerk's hearing at the Westborough District Court. Both testified that the hearing involved a criminal complaint, previously filed by Ford without the assistance of the Grafton police, relating to Davidson's harassing phone calls. As the women left the courthouse Davidson threatened to kill Ford. Ford and her sister proceeded directly to their parents' home. After they arrived, a telephone call was received from Davidson in which he stated he was coming over if he was not permitted to talk to Ford. Ford hid inside the house.

Ford's sister called the Grafton police and informed them that Davidson had called the home, threatened to come over, and had arrived. The police were also told that Ford was in the home and that there was a restraining order against Davidson. Two officers came to the house. They spoke only to Davidson, advised him how to retrieve belongings he claimed were inside the home, walked him off the property, and allowed him to drive off in his own vehicle. The police never spoke to Ford or anyone in her parents' home about the incident then or later.

On February 6, 1983, Ford contacted the Grafton police and told them that she had information that Davidson was trying to purchase a gun. The police logged the call but did nothing further. On the next day, Ford's sister called the Grafton police and complained that Davidson had been at 1 Birch Street and was going through the mailbox. This call

was noted, without further action; the sister testified that the police told her to call the post office.

On March 5, 1985, the date of Ford's divorce from Davidson, she agreed not to pursue a criminal complaint that she had caused to be issued against him for assault and battery. The complaint arose out of the October 22, 1984, attack on her at her place of employment. She testified that she agreed not to pursue the complaint out of fear and due to Davidson's assurances that he would move out of the area if she dropped the criminal matter. Davidson even provided her with a letter from his employer verifying that he had another job out of State.

Davidson did not relocate. Instead, he persisted in threatening Ford and violating the protective order. On April 26, 1985, while Ford was at 1 Birch Street, Davidson came through neighboring property and into the backyard. The Grafton police were called, and officer Glispin responded to the complaint. Davidson, however, had already left the area. Glispin asked that police in Millbury, where Davidson lived, contact Davidson and tell him to go to the Grafton police department. Davidson arrived at the police department and, upon questioning, admitted to violating the protective order by being present at 1 Birch Street. Glispin testified that he told Davidson he was tired of him upsetting Ford and if Davidson bothered her in the future, Glispin would do his best to get him into court. He did not arrest Davidson for violating the protective order but told him he would be summonsed to court for the violation. Davidson was not summonsed until September 19, 1985, five months after the incident.

The prosecutor was not provided with any information regarding the history between Davidson and Ford. Moreover, Ford was not notified of any prosecution of Davidson, made

aware of any court date, or summonsed to be a witness. She learned that Davidson was fined for the April 25, 1985, attack when she read about the court proceeding in a newspaper.

Ford began driving again in October, 1985, after not having done so for about a year. On October 25, 1985, after leaving a birthday party, she stopped at a traffic light where Davidson suddenly appeared and began pounding on her car. She testified that she went home, called the Grafton police to report the incident, and was told once more that there was nothing the police could do.

On October 25, 1985, the protective order expired. In November, 1985, Ford felt that she had disrupted her sister's family for over a year, and she still feared that their lives were in danger. She moved into her own apartment up the street from 1 Birch Street. She also began making plans to move out of State because she thought her safety depended on her doing so.

Ford received her last death threat from Davidson just before January 17, 1986. She reported the threat to the Grafton police. On January 16, 1986, Davidson paid the fines related to his April 25, 1985, offense.

On January 17, 1986, at about 6 in the evening, after a ten-hour work day, Ford was in her kitchen making supper. She heard someone at the door and first thought it was her sister. She then realized the kitchen door was starting to break because Davidson was kicking it in. Ford ran out the front door, chased by Davidson. She ran in front of a car, but it did not stop. She went to a neighboring house and pounded on the door, but no one let her inside. As she ran to the next house, Davidson caught her and he said, "Where do you want it? You bitch, you're going to die." Then he shot her;

she suffered three wounds to the face and neck, resulting in quadriplegia. Davidson then shot himself fatally.

On July 2, 1987, Ford sued the town of Grafton for the injuries she suffered in the January 17, 1986, shooting.[2] The complaint included claims for negligence, violations of her constitutional rights to due process of law and equal protection of the laws under 42 U.S.C. § 1983, and violations of her civil rights under G. L. c. 12, §§ 11H and 11I.[3] At trial, the judge ordered bifurcation of the case. Ford was to proceed with the liability portion of the case and postpone the presentation of evidence on damages, with the understanding that she might recall witnesses to testify on damages. At the close of the liability part of her case, the town moved for a directed verdict on all claims. As noted, the motion was allowed, and, Ford appeals.

1. Negligence under G. L. c. 258. The trial judge concluded, and we agree, that Ford's negligence claim, brought pursuant to G. L. c. 258, is based upon the town's failure to protect her. The evidence, taken in the light most favorable to the plaintiff, establishes that the town failed repeatedly to arrest Davidson despite its obligation to do so under G. L. c. 209A.[4] The town's disregard of its responsibility to arrest

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[2] The complaint also named the town of Clinton as a defendant. The parties stipulated to the dismissal of Clinton pursuant to Mass.R.Civ.P. 41(a)(1)(ii), 365 Mass. 803 (1974).

[3] Ford did not proceed on her State civil rights claim.

[4] General Laws c. 209A, § 6, as amended through St. 1983, c. 678, § 4, defined the powers of the police to act when they had "reason to believe that a family or household member has been abused or is in danger of being abused." The statute, which has been further amended after 1983, required that the police use all reasonable means to prevent further abuse, including:

under the law is alleged to be the proximate cause of Ford's injuries. The judge ruled that, despite this evidence of negligence, the town was immune from liability under G. L. c. 258, § 10(h), (j).

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> "(1) remaining on the scene as long as there is immediate danger to the physical safety of such person without the presence of a law officer, including but not limited to staying in the dwelling unit for a reasonable period of time; (2) assisting such person in obtaining medical treatment necessitated by an assault, which may include driving the victim to the emergency room of the nearest hospital, or arranging for appropriate transportation to a health care facility, any law to the contrary notwithstanding; (3) giving such person immediate and adequate notice of his or her rights; (4) arresting any person whom the officer has probable cause to believe has committed a felony; (5) arresting any person who has committed, in the officer's presence, a misdemeanor which involves abuse; (6) arresting any person whom the officer has probable cause to believe has committed a misdemeanor pursuant to section thirty-four C of chapter two hundred and eight or section seven of chapter two hundred and nine A." (Emphasis added.)

General Laws c. 209A, § 7, inserted by St. 1983, mandates that

> "[w]henever the court orders the defendant to refrain from abusing the plaintiff or orders the defendant to vacate the household under section three or four . . . [l]aw enforcement officers shall use every reasonable means to enforce such orders. Law enforcement agencies shall establish procedures adequate to insure that an officer on the scene of an alleged violation of such order shall be punishable by a fine of not more than five thousand dollars or by imprisonment for not more than two and one-half years in the house of correction or both such fine and imprisonment. Each such order issued shall contain the following statement: VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE."

The Massachusetts Tort Claims Act, G. L. c. 258, allows recovery against governmental entities for those with valid tort claims. See Lawrence v. Cambridge, 422 Mass. 406, 408 (1996). Prior to the Supreme Judicial Court's decision in Jean W. v. Commonwealth, 414 Mass. 496 (1993), the court "had precluded liability for otherwise valid claims if the plaintiff could not establish a special relationship between himself and the public employee." Lawrence v. Cambridge, 422 Mass. at 408. In Jean W. v. Commonwealth, 414 Mass. at 499, the court announced its intention to abolish this so-called "public duty rule" and invited the Legislature "to respond to this anticipated change by passing additional limitations on liability." Ibid. The Legislature responded with an amendment of G. L. c. 258, § 10 (St. 1993, c. 495, § 57), adding "what in effect is a statutory public duty rule providing governmental immunity." Carleton v. Framingham, 418 Mass. 623, 627 (1994).[5] The sections of this amendment that are raised in the present case state:

> "The provisions of sections one to eight, inclusive, shall not apply to:
>
> . . .

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[5] By St. 1993, c. 495, § 144, the amendment was to "apply to all claims upon which a final judgment has not entered, or as to which an appeal is pending or the appeal period has not expired, and to all claims upon which suit is filed after the effective date of this act." The retroactive application of the amendment withstood constitutional challenge in Carleton v. Framingham, 418 Mass. at 634. Therefore, although the present case was brought prior to the amendment, retroactive application is appropriate.

"(h) any claim based on the failure to establish a police department or a particular protection service, or if police protection is provided, for failure to provide adequate police protection, prevent the commission of crimes, investigate, detect or solve crimes, identify or apprehend criminals or suspects, arrest or detain suspects, or enforce any law, but not including claims based upon the negligent operation of motor vehicles, negligent protection, supervision or care of persons in custody, or as otherwise provided in clause (1) of subparagraph (j).

. . .

"(j) any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the violent or tortious conduct of a third person, which is not originally caused by the public employer or any other person acting on behalf of the public employer. This exclusion shall not apply to:

> "(1) any claim based upon explicit and specific assurances of safety or assistance, beyond general representations that investigation or assistance will be or has been undertaken, made to the direct victim or a member of his family or household by a public employee, provided that the injury resulted in part from reliance on those assurances. A permit, certificate or report of findings of an investigation or inspection shall not constitute such assurances of safety or assistance; and

> "(2) any claim based upon the intervention of a public employee which causes injury to the victim or places the victim in a worse position than he was in before the intervention. . . .
>
> "Nothing in this section shall be construed to modify or repeal the applicability of any existing statute that limits, controls or affects the liability of public employers or entities."

Ford argues that the trial judge erred in ruling that G. L. c. 258, § 10(h), (j), provides immunity to the town. She contends these provisions do not preclude her claim because (1) the town gave her direct assurances that she was receiving all the protection she was entitled to receive under G. L. c. 209A and she was injured as a result; (2) the town intervened in her case and, therefore, caused her injury or enhanced her vulnerability to Davidson's threats; and (3) G. L. c. 209A provided her with a claim against the town under the savings clause of G. L. c. 258, § 10.

While the town's negligence reasonably could be inferred from the evidence, we are bound by the Legislature's explicit choice to immunize the town in the circumstances of this case. Section 10(h) specifically bars claims based on the "failure to provide adequate police protection, prevent the commission of crimes, investigate, detect or solve crimes, identify or apprehend criminals or suspects, arrest or detain suspects, or enforce any law." "Aside from its exceptions clause (h) seeks to immunize a municipality when the criminal acts of a third person are a cause of a plaintiff's harm, and the police were negligent in not preventing that criminal conduct." Carleton v. Framingham, 418 Mass. at 629. Therefore, while the town might have prevented Ford's inju-

ries, its failure to do so is excluded from liability under the statute. Contrast Brum v. Darmouth, 44 Mass. App. Ct. 318 (1998).

Section 10(j)(1) is the relevant statutory exception to police immunity conferred by § 10(h). The § 10(j)(1) exception applies when the claim is based "upon explicit and specific assurances of safety or assistance, beyond general representations that investigation or assistance will be or has been undertaken, made to the direct victim or a member of his family or household by a public employee, provided that the injury resulted in part from reliance on those assurances." Ford argues that the town is liable under § 10(j)(1) because it gave her direct assurances that she was receiving all the protection she was entitled to receive under G. L. c. 209A, and she was injured as a result of her reliance on those assurances. Moreover, Ford urges here, as below, that the act of the Legislature in enacting G. L. c. 209A -- a statute of general applicability -- and the act of the court in issuing her a protective order constitute an assurance of safety or assistance by individuals in the town's police department.

Not so. Subsection (j)(1) does not define the terms "explicit" or "specific" assurances, but the Supreme Judicial Court has interpreted the words in accordance with their plain meaning. See Lawrence v. Cambridge, 422 Mass. at 410. The court recognized the similarity in the meaning of the words but clearly, stated the differences:

> "[W]e believe that by 'explicit' the Legislature meant a spoken or written assurance, not one implied from the conduct of the parties or the situation, and by 'specific' the terms of the assurance must be definite, fixed, and free from ambiguity."

Ibid. The town may have given Ford and her family explicit and specific assurances, but the assurances were not of safety or assistance. Compare id. at 411-412 (genuine issue of material fact whether the city's promise to protect the plaintiff when he closed his store at night was explicit and specific assurance of safety or assistance as to fall within the provisions of G. L. c. 258, § 10[j][1]). To the contrary, the town assured Ford and her family it could not take any action until it saw Davidson violating the protective order or he actually caused Ford harm. Further, there was testimony that the police told Ford they were not her babysitting service and advised her to get a gun for protection. Accordingly, we conclude the evidence precludes a finding that the town gave "explicit and specific assurances of safety or assistance to the victim or her family.

Ford next argues that § 10(j)(2) provides an exception to the town's immunity. She contends the town's intervention caused injury or enhanced her vulnerability to Davidson's threats. The town's alleged negligent intervention is based on its failure to investigate, detect crime, apprehend, arrest, and enforce the law. The intervention is not based on collateral negligence in the course of any one of these police functions.[6] See Glannon, Liability for "Public Duties" Under the Tort Claims Act: Legislature Reconsiders the Public Duty Rule, 79 Mass. L. Rev. 17, 19, 24 (1994) (providing examples of claims based on collateral police negligence that § 10(h) does not immunize). Ford's claim is within the § 10(h) exclusion for police protection activities. Accordingly, we

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[6] In her reply brief, Ford attempts to separate her claim from § 10(h) by arguing that it is based on the town's misrepresentation of her rights under G. L. c. 209A. While we agree that this argument may support her reasons for failing to renew her protective order, we do not agree that this characterization of her claim removes it from the purview of § 10(h).

are bound to consider only the specific limitations to this exclusion enumerated by the Legislature, i.e., those contained in § 10(j)(1); the limitations in §10(j)(2) are not enumerated.

Lastly, Ford argues that G. L. c. 209A provides her a claim against the town pursuant to the last paragraph of § 10. Again, this clause states: "Nothing in this section shall be construed to modify or repeal the applicability of any existing statute that limits, controls or affects the liability of public employers or entities." Ford contends that the town's disregard of the language of G. L. c. 209A, which requires police officers to arrest any person whom the officer has probable cause to believe has violated a protective order, renders the town liable as matter of law. We agree that G. L. c. 209A mandates police officers to act in accordance with the statute. However, we find no language in the statute that holds officers liable for failing to do so. Accordingly, G. L. c. 209A does not give Ford a claim against the town under the "savings clause" of G. L. c. 258, §10.

2. The 1983 claims. Ford argues three distinct claims under 42 U.S.C. § 1983. First, she contends the town violated her right to procedural due process of law by failing to provide the mandatory protections she was entitled to under G. L. c. 209A. Second, she maintains the town's acts violated her right to substantive due process. Finally, she argues the town violated her right to equal protection of the laws because it had a custom or policy of providing less protection to victims of domestic violence than to victims of other violence, that this was the product of class or gender discrimination, and that the custom or policy caused her injuries. The trial judge allowed the town's motion for a directed verdict on each claim, and we affirm.

Two elements are essential for a claim under § 1983. "First, the challenged conduct must be attributable to a per-

son acting under color of state law . . . ; second, the conduct must have worked a denial of rights secured by the Constitution or by Federal law." Soto v. Flores, 103 F.3d 1056, 1061 (1st. Cir. 1997). This second prong "requires the plaintiff to prove not only a deprivation of federal right, but also that the defendant's conduct was a cause in fact of the alleged deprivation." Ibid.

a. Procedural due process claim. The United States Supreme Court, in Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), held that property interests created by State law are afforded due process protection. These interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Id. at 577.

Ford argues that her protective order created a property interest in police enforcement that is cognizable under Roth. See Coffman v. Wilson Police Dept., 739 F. Supp. 257, 263-266 (E.D.Pa. 1990) (properly-served protective order issued pursuant to the Pennsylvania Protection From Abuse Act created special relationship between police and spousal abuse victim and, thus, created constitutionally protected "property interest" in police enforcement).

We question whether a protective order, properly served upon the police department, creates a Roth property interest that is secured by due process of law. No Massachusetts court has determined that a protective order creates a special relationship between the police and a domestic violence victim and, thereby, provides a constitutionally-protected "property interest". We need not decide this issue, however, because Ford did not have a protective order against David-

son at the time of her injuries. If a court gives rise to such an entitlement, its absence defeats the claim.[7]

b. Substantive due process claim. Ford argues the town violated her right to substantive due process under the Fourteenth Amendment to the United States Constitution by failing to protect her against Davidson's violence. The trial judge held this claim was precluded by the United States Supreme Court decision in DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. (1989).

In DeShaney, the Court concluded "that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." Id. at 197. The Court recognized "that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." Id. at 198. See, e.g., Estelle v. Gamble, 429 U.S. 97 (1976) (the Eighth Amendment's prohibition against cruel and unusual punishment, made applicable to the States through the Fourteenth Amendment's Due Process Clause,

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[7] Ford argues that the expiration of her protective order does not preclude her claim because the claim is not limited to the right to police response on January 17, 1986. She contends her procedural due process claim is premised upon her right to have Davidson arrested for his repeated violations of the order and her right to have the town advise her of the contours of her entitlement to police protection. She claims the town's failure to provide her with the statutory protections throughout the term of the protective order, together with the misrepresentation of her rights, caused her to refrain from renewing the order and left her more vulnerable to Davidson's attack on January 17, 1986.

We conclude, after considering the evidence with all reasonable inferences drawn for the plaintiff, that even if the town deprived Ford of her property right during the term of the order, and that deprivation made her more vulnerable to Davidson's final attack, it was not the actual cause of her January 17, 1986, injuries.

requires the State to provide adequate medical care to incarcerated prisoners); Youngberg v. Romeo, 457 U.S. 307 (1982) (substantive component of Fourteenth Amendment Due Process Clause requires the State to provide involuntarily committed mental patients with services necessary to ensure their "reasonable safety" from themselves and others).

The imposition of an affirmative duty occurs only "when the State takes a person into its custody and holds him there against his will." Id. at 199-200. The rationale for this principle was stated:

> "[W[hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – e.g., food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause."

Id. at 200.

The town's actions fall outside the constitutionally proscribed conduct enunciated in DeShaney. Nothing in the evidence suggests that the town restricted Ford's liberty so as to give rise to an affirmative duty to protect. Ford argues that the evidence shows numerous acts by the town that enhanced her danger and, therefore, caused he injuries. While these acts may have rendered Ford "more vulnerable to danger in the sense that those acts may have exacerbated . . . [her injuries,] these are not the kind of 'affirmative acts' by the [town] that would give rise to a constitutional duty to protect." Souza v. Pina, 53 F.3d 423, 427 (1st. Cir. 1995) (District Attorney's comments to press encouraging the me-

dia to link murder suspect who committed suicide, even if District Attorney were aware of suspect's suicidal tendencies). See DeShaney, 489 U.S. 189 (State had no constitutional duty to protect child from his father after receiving reports of abuse, despite claim that special relationship existed between the child and the State).

c. Equal protection claim. Although there is no constitutional right to police protection, "[t]he State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. at 197 n.3. Ford argues that the town's denial of protection to her, as a domestic violence victim, constitutes an equal protection violation.

The standard applied to equal protection claims brought by domestic violence victims requires a showing of "a policy or custom of providing less protection to victims of domestic violence than to victims of other crimes, that gender discrimination is a motivating factor, and that the [victim] was injured by the practice." Soto v. Flores, 103 F.3d at 1066 (adopting standard articulated by the court in Watson v. Kansas City, 857 F.2d 690 [10th Cir. 1988], and subsequently adopted by several other Federal Circuit Courts of Appeal).

Ford argues that she introduced sufficient evidence to meet the standard. She contends that the town's custom or policy is established through (1) her own experience with the town since it included a series of contacts for over a year that ended in a "single brutal incident" sufficient to show that a violation took place; (2) the failure to train officers in domestic abuse; (3) G. L. c. 209's mandate to protect domestic violence victims, which was repeatedly flouted by the town; (4) the preferential treatment given to an abuse victim in an unrelated, nondomestic case; and (5) the town's demeaning

statements regarding Ford's marital status and requests for help.

As stated, an equal protection claim requires Ford to "demonstrate that she was treated differently because of her membership in a certain class." Watson v. Kansas City, 857 F.2d at 696. Deliberate indifference in Ford's case alone would be insufficient evidence of different treatment. Ibid. A plaintiff normally "must point to facts outside the plaintiff's own case to support the allegation of an unconstitutional municipal policy." Id. at 695 (plaintiff presented statistical evidence showing great disparity between arrests for nondomestic assault cases and arrests for domestic assaults). It is true that some courts have permitted equal protection claims to proceed on a lesser showing. See, e.g., Balistreri v. Pacifica Police Dept., 901 F.2d 696, 701 (9th Cir. 1990) (police officer's comment that plaintiff's husband was entitled to hit her because she was "carrying on" suggested an animus against abused women sufficient to survive motion to dismiss). However, "the stringent standards imposed by the majority of circuit courts are more in keeping with the Supreme Court's approach to equal protection challenges to facially neutral policies." Soto v. Flores, 103 F.3d at 1068. We evaluate Ford's equal protection claim accordingly.

The evidence may establish deliberate indifference in Ford's case, but there is no showing of systematically different treatment by the town between domestic abuse cases and nondomestic abuse cases. Rather, Ford offers only the better treatment given to one female, nondomestic violence victim. In sum, the evidence offered fails to show a pattern that constitutes a custom or policy of selective enforcement.

Moreover, even if the evidence established such a custom or policy, it would not necessarily establish the town's intent to discriminate against women and/or victims of domestic

violence. "[T]he mere existence of disparate treatment – even widely disparate treatment – does not furnish adequate basis for an inference that the discrimination was [impermissibly] motivated." Soto v. Flores, 103 F.3d at 1067, quoting from Dartmouth Review v. Dartmouth College, 889 F.2d 13, 19 (1st Cir. 1989). A domestic violence victim seeking to prove an equal protection violation must show that the police were motivated by a discriminatory purpose. Discriminatory purpose has been defined by the United States Supreme Court as being:

> "more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a course of action at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group."

Soto v. Flores, 103 F.3d at 1067, quoting from Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

We conclude that the evidence, "while painting an unwholesome picture, is not enough to meet the strict standards imposed by the Supreme Court for showing discriminatory intent in equal protection claims." Soto v. Flores, 103 F.3d at 1072.

3. Conclusion. As the Court recognized in DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. at 202-203, '[j]udges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for [Ford] to receive adequate compensation for the grievous harm inflicted upon [her]." Before yielding to that impulse, we must remember that we are bound by our Constitutions and laws. The people of Massachusetts may choose by legislation to hold towns and their officials accountable in situations like

this one. Also as recognized in DeShaney, supra at 103, however, "they should not have [accountability] thrust upon them by this Court's expansion of the Due Process Clause of the Fourteenth Amendment," nor by the Equal Protection Clause or G. L. c. 258.

Judgment affirmed.

**APPENDIX B**

APPEALS COURT
FOR THE
COMMONWEALTH OF MASSACHUSETTS

No. 96-P-1941

Worcester County

---

CATHERINE M. FORD,
Plaintiff-Appellant,

vs.

TOWN OF GRAFTON,
Defendant-Appellee.

---

On Appeal From a Judgment of the Superior Court

---

BRIEF FOR PLAINTIFF-APPELLANT
CATHERINE M. FORD

---

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**APPENDIX C**

**Commonwealth of Massachusetts**

Appeals Court for the Commonwealth

At Boston,

In the case no. 96-P-1941

CATHERINE M. FORD

*vs.*

TOWN OF GRAFTON.

Pending in the Superior
Court for the County of Worcester

Ordered, that the following entry be made in the docket.
Judgment affirmed.

By the Court,

/s/ _____, Clerk.
Date May 8, 1998

## APPENDIX D

**Supreme Judicial Court for**
**the Commonwealth of Massachusetts**
**1412 Courthouse, Boston, Massachusetts 02108**
**(617) 557-1020**

Elizabeth Fisher, Esquire
Fisher, Mandell & Newlands
47 Harvard St.
Worcester, MA 01609

Re: Docket No. FAR-09889

**CATHERINE M. FORD**
**vs.**
**TOWN OF GRAFTON**

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that the above-captioned Application for Further Appellate Review has been considered by the Court and is denied.

Jean M. Kennett, Clerk

Dated: July 2, 1998

To: Elizabeth Fisher, Esquire
Leonard H. Kesten, Esquire

**APPENDIX E**

COMMONWEALTH OF MASSACHUSETTS

| | | |
|---|---|---|
| WORCESTER, SS. | | CIVIL ACTION NO. 87-15911 |
| Catherine M. Ford | ) | |
| | ) | |
| vs. | ) | JUDGMENT AFTER RESCRIPT |
| | ) | |
| Town of Grafton | ) | |

The Appeals Court having duly issued a rescript dated May 8, 1998 affirming the judgment on directed verdict pursuant to MRCP 50 (a),

It is Ordered and Adjudged;

that the plaintiff Catherine Ford take nothing by complaint and that the action be and hereby is dismissed on the merits, with costs.

Dated at Worcester, Massachusetts this eighth day of July, 1998.

/s/

Assistant Clerk

**APPENDIX F**

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF WORCESTER
THE SUPERIOR COURT

DOCKET # WOCV87-015911

RE: Ford v. Clinton et al

TO: Elizabeth A Fisher
Fisher Mandell Newlands & Quick
47 Harvard Street
Worcester MA 01609

NOTICE OF DOCKET ENTRY

You are hereby notified that on 06/07/98 the following entry was made on the above referenced docket:

Rescript rec'd from Appeals Court 6/7/98- "Judgment Affirmed" Copies Mailed 7/9/98

Dated: 9th Day of July, 1998

Loring P Lamoureux
Clerk of the Courts

BY:
Asst Clerk (to be assigned)
Telephone: 508-770-1899, Ext 125-FOR MOTIONS & EXT 103 FOR TRIALS

## APPENDIX G

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF WORCESTER
THE SUPERIOR COURT

DOCKET# WOCV87-015911

RE: Ford v Clinton et al

TO: Elizabeth A Fisher
Fisher Mandell Newlands & Quick
47 Harvard Street
Worcester MA 01609

NOTICE OF DOCKET ENTRY

You are hereby notified that on 06/09/98 the following entry was made on the above referenced docket:

> JUDGMENT After Rescript: Entered July 8, 1998- The Appeals Court having duly issued a rescript dated May 8, 1998 affirming the judgment on directed verdict pursuant to MRCP 50 (a). It is Ordered and Adjudged; that the plaintiff Catherine Ford take nothing by complaint and that the action be and hereby is dismissed on the merits, with costs. Copies Mailed 7/9/98

Dated: 9th day of July, 1998

Loring P Lamoureux
Clerk of the Courts

BY:
Asst Clerk (to be assigned)
Telephone: 508-770-1899, Ext 125-FOR MOTIONS & EXT 103 FOR TRIALS

(2)

No. 98-557

FILED
OCT 29 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

# Supreme Court of the United States

October Term, 1998

CATHERINE M. FORD,

*Petitioner,*

*vs.*

TOWN OF GRAFTON,

*Respondent.*

*On Petition for Writ of Certiorari to the Appeals Court for the Commonwealth of Massachusetts*

## RESPONDENT'S BRIEF IN OPPOSITION

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## STATEMENT OF THE CASE

This petition seeks this Court's review of a decision of the Appeals Court for the Commonwealth of Massachusetts. In that detailed decision, the Appeals Court affirmed the trial court's entry of a directed verdict against the petitioner at the close of her case-in-chief. As discussed below, there is no cause for this Court's review of the petitioner's factbound contentions regarding the entry of that directed verdict, contentions which the Appeals Court rejected.

### A. The Petition Omits Certain Key Facts And Is Without Proper Support.

In her statement of the case, the plaintiff makes numerous factual allegations without any citation to the record. In her statement of the procedural background, the plaintiff states that two defense motions for summary judgment were denied and that the trial judge entered a directed verdict without an explanatory memorandum. These statements, while technically accurate, mischaracterize what actually occurred. While the plaintiff implies that the denials of the motions for summary judgment were well reasoned, and the allowance of directed verdict was not, the facts are to the contrary.

The defendant's first motion for summary judgment was heard by Judge James Donohue of the trial court. The motion asked for summary judgment both on the State Tort and Federal Civil Rights claims. The judge's entire decision on this complicated motion consisted of one word from the clerk, "Denied." *See* Record Appendix Volume I, pg. 308.

The defendant's second motion for summary judgment was heard by Judge Stephen Neel of the same court. His decision regarding these issues was rendered in a margin endorsement

indicating, with no explanation, that "there remain genuine issues of material fact, the motion is denied." Neither judge indicated in any way the basis for his decision, nor indicated what material facts were in dispute.

In contrast, the trial judge, Diane Kottmyer, heard all of the plaintiff's evidence and allowed extensive argument regarding both the plaintiff's State and Federal claims. The arguments regarding the State Tort claims are found between pages 430 and 455 of Volume II of the trial transcripts. Following these legal arguments, Judge Kottmyer spoke at length. She concluded her remarks on page 456 by stating that the directed verdict for the defendant should enter since "I do see it as not a close case".

Judge Kottmyer also heard extensive argument regarding the Federal claims beginning on page 460 and extending until page 481 of Volume II of the trial transcripts. The Judge explained her reasoning for entering a directed verdict on the Federal claims. This analysis can be found in the transcript between pages 482 and 485. She concluded that

> it is my view that it is not a close question and that under the principles of both constitutional and Mass. Tort Claims Law a claim does not stand in this case, and for that reason I'm directing a verdict.

Trial Transcripts Volume II pg. 485.

It is undeniably sad that the plaintiff was shot and wounded by her ex-husband who then shot himself. However, the undisputed facts establish that a restraining order was in effect from October 18, 1984, until October 25, 1985. During that time, the only act of violence against Ms. Ford was an assault and battery by her husband, Mr. Davidson, on October 22, 1984,

in the Town of Northboro. The Northboro Police Department responded, and Ms. Ford obtained a criminal complaint against Mr. Davidson for that assault and battery. Unfortunately, Ms. Ford decided to drop those charges on March 5, 1985. No other acts of violence against the plaintiff occurred during the pendency of the protective order.

The last documented contact between the plaintiff and the Grafton Police occurred on April 25, 1985, when Davidson was charged with violating the restraining order by Officer Glispin of Grafton. At that time, Officer Glispin testified that he told Davidson that

> I was personally sick and tired of him upsetting Cathy Ford, and that I was going to summons him to court for a violation of 209A, and that every time after that if I had any dealings with him, I would do my best to get him in court every single time he bothered her; I was sick of it.

Trial Transcripts Volume II p. 286. There is no other documented contact regarding the plaintiff between anyone and the Grafton Police until January 17, 1986, the day that Mr. Davidson shot her and then committed suicide.

**B. The Petition Neglects To Adequately Detail The Appellate Course Of This Case.**

The petitioner appealed the trial court judgment to the Appeals Court for the Commonwealth of Massachusetts. That Court rejected the petitioner's arguments of error, and affirmed the judgment. The petitioner then applied to the Supreme Judicial Court of the Commonwealth for further appellate review. That Court denied the application. Thereafter, the petitioner submitted this petition.

## REASONS FOR DENYING THE WRIT

### I.

### THERE EXISTS NO COMPELLING REASON TO GRANT THE WRIT.

According to Supreme Court Rule 10, a petition for writ of certiorari will be granted "only for compelling reasons." As indicated in Rule 10(b) and (c), the character of the reasons the Court considers with respect to a petitions for a writ of certiorari to a State court, as involved here, include whether a State court (1) has decided an important Federal question in a way that conflicts with the decision of another State court of last resort or of a United States Court of Appeals; (2) has decided an important question of Federal law that is not been, but should be, settled by this Court; or (3) has decided an important Federal question in a way that conflicts with relevant decisions of this Court.

No such compelling reasons exist in this case. Rather, the petition presents only factbound assertions, pertinent only to this case and its parties, which do not warrant review by this Court. The decision below was a plainly correct application of settled law, and no conflict among the State or Federal circuits is even alleged.

For these reasons, the Petition for Writ of Certiorari should be denied.

#### A. The Appeals Court Properly Affirmed the Entry of a Directed Verdict on the Due Process and Equal Protection Claims.

According to her first "question presented," the petitioner seeks relief from the trial court's granting of a directed verdict

as to her due process and equal protection claims, claiming that triable issues of fact existed as to each claim. This Court, however, ordinarily does not grant certiorari merely to review evidence or draw inferences therefrom. *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951). This question, therefore, does not provide a basis warranting the grant of the petition.

In any event, the trial judge properly entered a directed verdict for the defendant, and the Appeals Court properly affirmed the entry of a directed verdict, on both the due process and equal protection claims.

i. *There Was No Viable Substantive Due Process Claim.*

The petitioner claims as a reason for granting the writ that she had a viable substantive due process claim against the Town because it failed to protect her. The Appeals Court, however, properly determined that under *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." The petitioner does not dispute this point, and thus does not claim that the Appeals Court's decision in any way conflicted with *DeShaney*.

Rather, the petitioner claims that the Town engaged in "affirmative acts" which placed her in a position of danger from her former husband and then failed to protect her. She relied on the case of *Soto v. Flores*, 103 F.3d 1056 (1st Cir. 1997) in this regard. That case, however, is unavailing because the facts are markedly different.

In *Soto*, the police, knowing that the petitioner's husband had threatened to kill the petitioner and her family if she went to the police to have him jailed for spousal abuse, nonetheless

told the husband that the petitioner's had complained to them about abuse. Four days after the petitioner's first complaint to the police about the abuse, the husband killed himself and the couple's two children. *Id.* at 1058. The plaintiff in that case alleged that informing her husband of her complaints while knowing of his threats was an "affirmative act" which placed her children in a greater position of danger posed by the husband and which led to their deaths. *Id.* at 1063.

In sharp contrast, the Town here did not take any such affirmative act which placed the petitioner in any greater danger than existed when she first contacted its police department. It in no way created or enhanced any danger to the petitioner, and the petitioner has not identified any actions to indicate otherwise. Indeed, the Police Department successfully protected her from physical harm during the time the restraining order was in effect. It is undisputed that during the pendency of the restraining order the plaintiff was not physically harmed. The petitioner allowed the order to expire and, three months later, her former husband inflicted the injuries upon her.

In light of the foregoing, the Appeals Court properly rejected the petitioner's affirmative acts argument, noting that the Town's acts were not the kind of "affirmative acts" that would give rise to a constitutional duty to protect. This decision was a plainly correct application of the law as stated in *DeShaney* and *Soto* and their progeny. There exists no compelling reason to grant the writ on the basis of this fact-based substantive due process claim.

ii. *There Was No Viable Procedural Due Process Claim.*

Similarly, there exists no compelling reason for granting the petition for writ of certiorari on the procedural due process claim.

The petitioner argues that the protective order she has obtained created a property interest in police enforcement that was cognizable under *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). The Appeals Court rejected this argument for the simple reason that the petitioner did not have a protective order against her former husband at the time of her injuries. Given this important fact, the Appeals Court did not even decide the question whether a protective order created a *Roth* property interest secured by due process. The absence of such an order in this particular case clearly defeated any claim of a property interest therein.

The petitioner attempts to sidestep this fatal defect by arguing that her claim in this regard included the Town's failure to arrest Davidson during the term of the protective order and/or to advise her of her entitlement to police protection. Contrary to the implication in the petition, the Appeals Court did address this argument and concluded that, even if the Town had deprived her of her property right during the term of the order, that deprivation was not the actual cause of her injuries some months after the order had expired.

The Appeals Court decision thus, again, is in accord with the law, and not in conflict with any State or Federal circuit decision. This claim does not state a reason warranting review by this Court.

iii. *There Was No Viable Equal Protection Claim.*

The petitioner's fact specific argument on her equal protection claim also does not state a compelling reason warranting this Court's grant of the writ.

The petitioner asserts that she had introduced sufficient evidence to show that the Town had a policy or practice of

providing less protection to victims of domestic violence than to victims of other crimes, and that such policy was motivated by gender discrimination. Applying the "stringent standards" identified in *Soto v. Flores*, 103 F.3d at 1068, as being in keeping with the Supreme Court's approach to equal protection challenges, the Appeals Court correctly rejected this assertion. The Court properly determined that the petitioner had not made a showing of systematically different treatment by the Town between domestic abuse cases and non domestic abuse cases. Her offer of better treatment given to one female, non domestic violence victim did not show a pattern that constituted a custom or policy of selective enforcement, and deliberate indifference in her case alone, even if shown, would be insufficient to demonstrate different treatment. *See Watson v. City of Kansas City, Kansas*, 857 F.2d 690, 695 (10th Cir. 1988). Indeed, the plaintiff's evidence suggested that The Town treated complaints by women seriously.

There exists no compelling reason for this Court to grant a writ on the basis this fact-specific, case-specific claim.

## CONCLUSION

Contrary to the petitioner's assertion, this case does not directly affect the viability of every single domestic abuse protective order. A determinative point in this particular case is that there was no protective order in effect at the time the petitioner suffered her injuries. This fact alone warranted the entry of a directed verdict against her after her case-in-chief under application of settled law.

For the reasons given above, this Court should deny this Petition for Writ of Certiorari.

Respectfully submitted,

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